(2)

No. 98-1682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

MOTION TO AFFIRM

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Appellee Playboy Entertainment Group, Inc. was the plaintiff in the court below. The United States of America, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission were the defendants. Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.) was a party below in a consolidated action at the preliminary injunction stage, but did not participate in the litigation on the merits. Playboy Enterprises, Inc., through a wholly-owned subsidiary, acquired Spice in March 1999.

Pursuant to Supreme Court Rule 29.6, Appellee notes that Playboy Entertainment Group, Inc. ("PEGI") is a non-publicly traded corporation organized under the laws of Delaware and is a wholly-owned subsidiary of Playboy Enterprises International, Inc. ("PEII"), a non-publicly traded corporation organized under the laws of Delaware. Both PEII and Spice are wholly-owned subsidiaries of PEI Holdings, Inc. ("PEI Holdings"), a non-publicly traded corporation organized under the laws of Delaware. PEI Holdings is a wholly-owned subsidiary of Playboy Enterprises, Inc., a publicly traded corporation organized under the laws of Delaware.

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Appellee Playboy Entertainment Group, Inc. ("Playboy") respectfully requests that this Court affirm the decision of the three-judge district court that Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act"), violates the First Amendment to the United States Constitution.[1] Appellee further asks that this Court affirm the

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[1] To supplement the Opinions and Orders below provided as Appellants' Appendix (J.S. App. 1a-101a), the district court's opinion granting Appellee's request for a temporary restraining order (reported at 918 F. Supp. 813) is reprinted *infra* at App. 1a-17a. The district court's opinion denying the parties' cross-motions for summary judgment on the issue of vagueness (unreported) is at

district court's dismissal of Appellants' post-trial motions to modify the judgment.

The district court correctly held that Section 505 violates the First Amendment because it is more restrictive than necessary and because the government failed to prove that its stated interests were real and not conjectural. Specifically, the district court found that:

- Section 505 imposes a content-based restriction on constitutionally-protected speech that effectively imposes a ban on adult cable networks for two-thirds of the broadcast day in the vast majority of cable systems. J.S. App. 33a.
- Although the purpose of Section 505 is solely to protect children, it significantly restricts speech in all U.S. households, including the two-thirds of all homes that do not have children under 18. J.S. App. 34a.
- The "problem" of signal bleed was never established in the legislative history, which the court below described as "an absolute void." App. 15a. Nor was the problem demonstrated after two years of litigation involving extensive expert testimony. In sum, the government compiled anecdotal evidence comprising "only a handful of isolated incidents" in which signal bleed was a problem in "the 16 years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.
- Less restrictive means were found to exist to deal with any problems attributable to signal bleed. Cable television set-top converters, as well as modern television sets and VCRs have child lock-out features. In addition, Section 504 of the Act enables any customer to obtain on request free of charge a blocking device for any network. The court found that Section 504 is a less restrictive alternative because it addresses the phenomenon of signal bleed in a content-neutral manner that is tailored to the households that need it. J.S. App. 38a.

App. 20a-25a, *infra*. The Federal Communications Commission's denial of Appellee's request for a declaratory ruling is at App. 28a-29a, *infra*.

The district court correctly applied strict First Amendment scrutiny below, but its decision would be the same even if it had applied intermediate constitutional review. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*"). Section 505 imposes a wholesale ban on specified cable channels during "the hours when most viewers want to see such programming," J.S. 18 n.6, and thus is far more restrictive than either the "permissive" controls upheld in *Denver* or the per-program safe harbor upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"). The few anecdotal examples of signal bleed unearthed in the record below fall far short of what is required for the government to sustain its burden of showing that Section 505 "is necessary to protect children or that it is appropriately tailored to secure that end." *Denver*, 518 U.S. at 766. The record below also revealed that voluntary blocking, such as that provided by Section 504, was sufficient to rectify the problem in virtually all of the instances the government was able to find, J.S. App. 12a, placing the district court's decision squarely within the precedents relating to least restrictive means. *Denver*, 518 U.S. at 757-759. Consequently, the decision below should be summarily affirmed, because this case presents no substantial federal question requiring appellate review by this Court.

STATEMENT

1. Cable television operators provide their subscribers with various packages of programming channels for a monthly fee. J.S. App. 5a. They typically provide a "basic" service that includes local broadcast networks, leased and public access channels, and news, education, music, sports and shopping channels. Unlike broadcasting channels that offer programming on a wide variety of subjects, a cable programming channel often is oriented toward a particular subject area. Operators also offer "premium" channels for an additional fee, the signals for which are scrambled to prevent unauthorized access. Such channels may include HBO, Cinemax, Showtime, and adult entertainment channels. *Id.* Premium programming may also be offered on a "pay-per-view" basis. The pay-per-view customer places an order with the cable

operator for a particular program or a specified period of time. When a consumer places a pay-per-view order, the operator unscrambles the signal for the viewing period and then rescrambles it by remote accessing a converter box in the subscriber's home. *Id.*

Since 1982, Playboy has provided cable operators with adult, sexually oriented programming on premium networks.[2] Playboy Television provides adult oriented programming that includes films, short form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Playboy Television also offers special event programming such as Playboy's well-received four-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. AdulTVision and Spice offer almost exclusively full-length movies.

Like the providers of other premium networks, Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The operators must descramble these transmissions before rescrambling the signal to restrict access to only those customers who have paid for the service. A phenomenon known as "signal bleed" may occur if discernible video and/or audio appears on cable customers' televisions although they have not purchased the premium channel or event. The court below described the nature and causes of signal bleed, and found that the "severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." J.S. App. 9a, 51a.

A variety of techniques are available to consumers to ensure they do not receive signal bleed. Cable signal converters and

[2]When this litigation began, Appellee provided programming on two networks, Playboy Television and AdulTVision, which was launched in 1994. Playboy recently acquired Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.), which was a party below in a consolidated action through the preliminary injunction stage.

wiring configurations may prevent bleed, and many, if not most, modern TVs and VCRs enable viewers to program the devices to block reception of either an undesired channel or types of programming considered to be offensive.[3] In addition, since 1984, federal law has required cable operators to offer their subscribers the ability to purchase or rent "lockboxes" to block out a particular channel or channels. 47 U.S.C. § 544(d)(2).

2. As part of the Telecommunications Act of 1996, Congress adopted a number of measures designed to enable parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 of the Act requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel. 47 U.S.C. § 560. Similarly, Section 551, the so-called V-chip provision, requires that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."[4] 47 U.S.C. § 303 note.

Congress also enacted Section 505, the subject of this litigation, which requires that for any channel of service "primarily

[3]J.S. App. 9a-10a. Record evidence demonstrates that cable television set-top boxes ("converters") with "channel mapping" features do not permit signal bleed. J.S. App. 51a. Further, addressable converters typically have built in parental lock-out devices. Such converters are routinely used by multiple system operators ("MSOs"). In addition, many televisions and VCRs already have built-in child-lock circuitry that allows parents or others to lock out the audio and video of any channel, thereby preventing signal bleed. In a recent survey, eighty percent of more than 100 models of televisions currently being sold by a major electronics store contained built-in child-lock circuitry, which has been available for at least the past several years. During this period, more than 70 million new televisions were sold in the United States. Pl.'s Trial Ex. 62(b) (TV and Digital TV Household Universe, 1979-2007).

[4]Although the V-chip provisions of the Act do not address the issue of signal bleed, Section 551 and the extensive deliberations surrounding it demonstrate the belief of Congress that voluntary measures that empower parents to control program choices will protect children.

dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 47 U.S.C. § 561. Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was passed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. -- two thirds of the broadcast day. *Implementation of Section 505 of the Telecomms. Act of 1996*, 11 FCC Rcd. 5386 (1996) (*"Implementation of Section 505"*).

Unlike Sections 504 and 551, Congress adopted Section 505 of the Act without hearings or debate. It was proposed as an amendment to the Senate telecommunications bill (S. 652) on June 12, 1995, and was voted upon and passed that same evening. 141 Cong. Rec. S8166-69 (daily ed. June 12, 1995). Section 505 was introduced as a floor amendment by Senators Lott and Feinstein, both of whom made brief remarks about it. *See id.* Other than these remarks, Congress gathered no information and made no legislative findings concerning Section 505.

3. Playboy brought suit in the United States District Court for the District of Delaware seeking injunctive relief and a declaration that Section 505 is unconstitutional.[5] Before Section 505 took effect, Playboy sought and received a temporary restraining order enjoining its implementation and enforcement. App. 18a-19a, *infra*. Pursuant to Section 561 of the Act and 28 U.S.C. § 2284, a three-judge district court was convened to hear the case. After a hearing on the motion for a preliminary injunction, the district court denied Playboy's motion for a preliminary injunction. J.S. App. 40a-86a.

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[5]Subsequently, Spice filed suit seeking similar relief on nearly identical grounds. *Graff Pay-Per-View* v. *United States*, Civ. Act. No. 96-107. The two cases were consolidated.

Although the district court denied Plaintiffs' request for a preliminary injunction, it identified a number of factual issues that it said would put it in "a better position" to consider whether the standard for a permanent injunction had been met. J.S. App. 53a & n.16. The court noted that it is not clear how many homes with the "potential" to receive signal bleed in fact receive it. The court asked for "more specific evidence" in subsequent proceedings on the actual extent of signal bleed as well as any evidence of its ill-effects on children, information on the degree to which adult networks would be adversely affected by Section 505 and evidence on the effectiveness of voluntary blocking pursuant to Section 504. *Id.* at 61a, 72a n.25, 79a-80a.

4. After this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997) but before the hearing on the permanent injunction below, Playboy filed a motion for summary judgment on the question of vagueness. The FCC had interpreted Section 505 as not requiring the scrambling or time channeling of programming that is "not indecent" even if provided on a channel primarily dedicated to sexually-oriented programming, but provided no definitional guidance for applying this interpretation. *Implementation of Section 505*, 11 FCC Rcd. at 5387. Playboy argued that the vagueness of the indecency standard, coupled with a total absence of relevant FCC precedent, prevented it from providing alternative programming during non-safe harbor hours, thus making Section 505 more uncertain and overbroad. Appellants filed a cross-motion for summary judgment on the same issue.

On October 31, 1997, the district court denied both parties' motions. Although it found that *Reno* was not dispositive of the question before it, the court noted that "there remains a fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours." App. 25a. It further pointed out that the government was "unable to advise us whether there are any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels 'primarily dedicated to sexually-oriented programming' in construing the scope of permissible regulation under Section

505," and deferred a decision "until further information relating to the enforcement of this provision by the Federal Communications Commission (FCC) is before us." *Id.* at 25a & n.6.

In connection with the district court's request for further evidence, Appellee filed a request for an expedited declaratory ruling with the FCC on November 19, 1997. The request asked for clarification of the indecency standard as it relates to Section 505, and asked for an advisory opinion with respect to nine programs that, with one exception, Playboy Television had either aired, or planned to transmit, on its network.[6] The FCC denied the request, and in a one-page letter, wrote that "declaratory rulings related to programming issues must be dealt with cautiously" and "have the potential to be viewed as prior restraints." *Letter from Meredith Jones, Chief, FCC Cable Services Bureau, to Robert Corn-Revere*, Jan. 30, 1998, *infra* App. 28a-29a. The FCC provided no further interpretive guidance, except that during the trial on the permanent injunction, the government argued that all of the programs submitted to the FCC, including safe sex documentaries, would be considered indecent if transmitted on Playboy Television.[7]

5. Following several days of hearings in March 1998, the district court in December held that Section 505 is unconstitutional. J.S. App. 1a-39a. The court decided that "either strict scrutiny or something very close to strict scrutiny" applies because Section 505 is a content-based restriction on speech.

[6]The request included two safe sex documentaries produced for World AIDS Day (*Doin' it Right* and *Hot, Sexy and Safer*), two critically acclaimed theatrical films (*9-1/2 Weeks* and *The Unbearable Lightness of Being*), two magazine-style Playboy news programs (*360 - Sex in the USA* and *Playboy Late Night*), a recurring program that describes a current issue of *Playboy* magazine and events related to Playboy (*World of Playboy*), a recurring feature on Playboy centerfold models (*Video Playmate Calendar*) and an action-adventure film (*Rambo: First Blood, Part II*). A videotape of each of the nine programs was provided to the FCC.

[7]Defs.' Post-Trial Br. at 67-69. One of the programs condemned by the government has been found to be acceptable for showing in a mandatory middle school assembly. *See Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

Although the provision ostensibly has a content-neutral objective of preventing signal bleed, the court noted that Section 505 is triggered only in response to specific types of adult programming. J.S. App. 25a ("Signal bleed from the Disney Channel, for example, does not come within the purview of the statute."). Ultimately, the court found that Section 505 is more restrictive than necessary to serve the government's stated interests.[8]

Although the court had been skeptical at the preliminary injunction stage of the potential losses that would be caused by Section 505, it found that the "restrictiveness of § 505 is now evident" given the experience following the law's implementation. J.S. App. 33a. The court found that cable operators with insufficient scrambling technology "unanimously chose[] to stop all such programming on dedicated adult channels during the non-safe harbor hours" and that the "vast majority" of cable systems adopted time channeling to comply with Section 505. *Id.* at 33a n.23. It noted that neither Playboy nor the government could identify a single cable system that had adopted any approach other than time channeling, and concluded that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. *Id.* at 16a-17a. Despite the parties' disagreement about the financial impact on Playboy, the court found that the actual amount of financial loss, while significant, "is of little relevance to [the] First Amendment analysis." *Id.* at 18a. It concluded that the time channeling requirement of Section 505 "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Id.* at 33a-34a.

At the same time, the court's reservations about the pervasiveness of signal bleed as a problem were not assuaged. While the district court agreed that Section 505 was intended to

[8]Because it resolved the case on the question of Section 505's relative restrictiveness, the court did not reach the merits of Playboy's contentions that Sections 505 is unconstitutionally vague and that it violates the Equal Protection Clause. J.S. App. 23a, 39a. If there are further proceedings in this case, however, these issues provide independent reasons why Section 505 is unconstitutional.

address a compelling interest, it pointed out that the "mere articulation of a theoretical harm is not enough." J.S. App. 28a. It further noted that the government presented "no evidence on the number of households actually exposed to signal bleed," and instead offered anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." *Id.* at 11a-12a. It found that the lack of evidence provided by the government at trial "is reflected by the same dearth of evidence of harm within the legislative history of § 505." *Id.* at 29a.

Comparing Sections 504 and 505 as alternative ways to deal with signal bleed, the court concluded that "§ 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive'" than Section 505. J.S. App. 34a. Significantly, the court found that "two-thirds of all households in the United States have no children" but that Section 505 applies "irrespective of whether a household has children." *Id.* at 33a-34a. It also found that the content-neutrality of Section 504 made it less restrictive of First Amendment interests than Section 505. Although the Justice Department had submitted evidence that very few subscribers had availed themselves of Section 504, the court noted that "the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. "Indeed," the court concluded, "the Government has not convinced us that it is a pervasive problem." *Id.*

The court found that cable operators communicate the availability of channel blocking through a variety of means, including monthly billing inserts, special mailings, barker channels and adult channel advertisements. J.S. App. 20a. But it said that it "is not clear" that such notices of the provisions of § 504 have been adequate. *Id.* at 36a. Accordingly, the court directed Appellee to ensure that cable operators provide their customers with "adequate notice" of Section 504. *Id.* at 38a.

The district court permanently enjoined the government from enforcing Section 505 by its Order dated December 29, 1999.

6. On January 12, 1999, the government filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and Rule 60(a) seeking to correct the judgment by including the "adequate notice" requirement within the mandate. Appellants filed a Notice of Appeal from the district court's decision and injunction order one week later, on January 19, 1999, while the motions to alter and correct the judgment were still pending. The district court dismissed the Rule 59(e) and 60(a) motions on March 18, 1999, holding that it lacked jurisdiction to consider them. J.S. App. 91a-92a. Appellants filed a further Notice of Appeal on April 7, 1999, seeking review of both the December 1998 and March 1999 Orders of the district court.

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION REGARDING THE UNCONSTITUTIONALITY OF SECTION 505

A. The District Court Correctly Applied Strict First Amendment Scrutiny to Section 505

The district court quite correctly applied strict First Amendment scrutiny in this case to find that Section 505 is unconstitutional. J.S. App. 23a-26a; 67a. Appellants' claim that the court should have scrutinized the law less rigorously on the theory that indecency on cable television is "constitutionally indistinguishable" from indecency on broadcast media (J.S. 17) is premised on a plain misunderstanding of controlling authority. While the *Denver* plurality compared broadcasting and cable television and found that both media are "pervasive," 518 U.S. at 744-745, it expressly declined the government's invitation to apply the *Pacifica* holding to cable television. *Id.* at 755 (plurality op.); 803-804 (Kennedy, J., concurring in part, dissenting in part).

The *Denver* plurality eschewed adoption of "a rigid single standard, good for now and for all future media and purposes," 518 U.S. at 742 (plurality op.), but the result in that case, as well as the reasoning of the various opinions, suggests that this Court applied a standard that is comparable to strict scrutiny.

Significantly, a majority of Justices expressly endorsed the use of strict scrutiny to review content-based speech restrictions imposed on cable television.[9] And while the plurality may not have applied strict scrutiny by name, *Denver's* speech-protective result was reached by "closely scrutinizing" the law "with the greatest care." 518 U.S. at 747 (plurality op.) ("Our basic disagreement with Justice Kennedy is narrow."); *id.* at 743 (Court must "closely scrutiniz[e]" the provisions of Section 10 to ensure that it does not impose "an unnecessarily great restriction on speech"). Accordingly, the district court correctly concluded that this Court prescribed the use of "strict scrutiny or something very close to strict scrutiny." J.S. App. 23a; 64a-68a.

Appellants, however, complain that the district court here gave no weight to the concerns requiring special treatment of broadcasting, J.S. 15, and assert that "[h]ad the district court taken *Pacifica* and its rationale into account, it would have upheld Section 505." *Id.* at 17. This is plainly wrong. First, Appellants' facile claim that the government's interest is stronger here than in the broadcasting context because *Pacifica* involved the "one-time broadcast of inappropriate language" compared to "channels that carry 'virtually 100% sexually explicit adult programming,'" J.S. 17, is not correct, nor is it supported by the record below.[10]

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[9] Justices Kennedy and Ginsburg wrote that strict scrutiny is the applicable standard, and that all of Section 10 should be invalidated. *See Denver*, 518 U.S. at 803-804 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part). Justices Thomas, Scalia and Chief Justice Rehnquist similarly agreed that strict scrutiny should apply to content regulation of cable television, but concluded, for reasons that are unique to leased access channels, that the blocking and segregation requirements of Section 10(b) were the least restrictive means of serving the governmental interest. *See id.* at 834 (Thomas, J., concurring in judgment in part and dissenting in part) (discussing least restrictive means analysis in light of the "distinguishing characteristic[s] of leased access channels").

[10] It is far from obvious from the record that a channel with 100% sexually explicit programming is any more harmful than any other premium channel. *Compare* App. 17a n.11 (describing the content of audio signal bleed from an adult channel as "akin to the utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*"), *with* Pl.'s Trial Ex. 18 at 2 (HBO film *Another 48 Hours* averages a profanity every 30 seconds).

Second, there is far less need here for the government to impose mandatory programming restrictions as opposed to voluntary blocking of a particular channel. Voluntary solutions are far more effective to block unwanted programming when transmitted on adult channels compared to broadcasting or even to other premium cable channels because the blocking device is fully effective upon its initial activation and does not require subsequent adjustments to keep up with changing programming schedules.[11]

Most importantly, the very outcome in *Denver* reveals the fundamental flaw in the government's reasoning. There, if this Court had "taken *Pacifica* and its rationale into account" in the way Appellants now suggest, it could not have reached the result that it did. In practical terms, *Denver* approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night. 518 U.S. at 752 (plurality op.). The editorial discretion to permit such programming (that by federal law is banned from the broadcast airwaves until safe harbor hours) on cable access channels is explained by the fact that this Court's cases "since *Pacifica* have * * * turned as much on the context or medium of the speech as on its content." *Id.* at 775 n.2 (Souter, J., concurring). A critical contextual factor here is that "other means to protect children" are available with cable television technology, and as described below, the district court correctly found that such "other means" represent a less restrictive alternative to Section 505. Additionally, as described below, Section 505 is far more restrictive of speech than the regulations upheld in *Pacifica*.

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[11] On cable channels where indecent programming is shown "randomly or intermittently between non-indecent programs," a lockbox is likely to be less effective than where it can be used to "simply block out certain channels." *Denver*, 518 U.S. at 833-834 (Thomas, J., concurring in the judgment in part and dissenting in part). Similarly, in the broadcasting context, this Court found that a warning announcement before a program "cannot completely protect the viewer or listener from unexpected program content" because "the broadcast audience is constantly tuning in and out." *Pacifica*, 438 U.S. at 748.

B. Section 505 is Unconstitutional Even Under Intermediate Scrutiny

Even if the district court had applied intermediate scrutiny to Section 505, it still would have found the law to be unconstitutional. Very simply, nothing in *Denver* or any other case supports the government's bald assertion that "[h]ad it not [applied strict scrutiny], the [district] court would have concluded that Section 505 is constitutional." J.S. 12. Quite to the contrary, the plurality in *Denver* found that the law at issue there "fails to satisfy this Court's formulations of the First Amendment's 'strictest,' as well as its somewhat less 'strict,' requirements." *Denver*, 518 U.S. at 755; *id.* at 803-804 (Kennedy, J., concurring in part and dissenting in part); *see also* J.S. App. 66a.

Precisely the same analysis applies here as in *Denver*. There, a majority voted to invalidate Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, § 10(b) ("1992 Cable Act") which required cable operators that chose to permit indecent programming on leased access channels to segregate such programming to a separate channel and to block access prior to receiving a written request.[12] This Court found that Section 10(b) was "more extensive than necessary" and that it failed to take into account "other means to protect children from similar 'patently offensive' material broadcast on *un*leased cable channels." 518 U.S. at 755-756 (plurality op.) (emphasis in original). The district court correctly held that both conclusions are equally warranted in this case.

[12] The Court in *Denver* also struck down Section 10(c) of the 1992 Cable Act, which restricted indecent programming on public access channels. The decision to invalidate Section 10(b), however, was the only part of the opinion of the Court to garner a majority. 518 U.S. at 753-760. Significantly, Section 10(b) was described by the government in this case as "remarkably similar to Section 505" and was the provision most often compared to Section 505 at the preliminary injunction stage of this litigation. *See* Defs.' Opp'n Br. to the Mot. for Prelim. Inj. at 2, 3, 4, 14, 21, 23, 24, 25, 26, 33, 34, 37, 40-42, 43, 54, 58, 63, 68, 71. (20 separate citations comparing Section 505 to Section 10(b)).

1. Section 505 is More Extensive Than Necessary to Serve the Government's Interest

There is no dispute that Section 505 prevents the transmission of Appellee's programming during "the hours when most viewers want to see such programming." J.S. 18 n.6. The district court found that Section 505 "restricts a significant amount of protected speech" because time channeling results in "the removal of all sexually explicit programming at issue during two-thirds of the broadcast day from all households on a cable system." J.S. App. 33a. The court found the restriction to be extensive since "30-50% of all adult programming is viewed by households prior to 10 p.m." and because Section 505 restricts access to such programming "irrespective of whether a household has children." *Id.* at 33a-34a. This factor makes the restrictions imposed by Section 505 particularly excessive since the district court found that "two-thirds of all households in the United States have no children." *Id.* at 34a.

It is no answer to suggest, as the government does here, that the speech restrictions imposed by Section 505 are constitutionally sound because the *Denver* plurality "relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there." J.S. 14. The only regulation upheld in *Denver*, out of the three at issue, is not comparable to Section 505. The rule upheld in *Denver* -- Section 10(a) -- merely permitted cable operators to reject indecent programming on leased access channels. Unlike Section 505, Section 10(a) imposed no requirement at all on cable operators to restrict indecent programming,[13] and the vast majority

[13] *Denver*, 518 U.S. at 750 (plurality op.) (Court approved only permissive controls on indecent leased access programming); *id.* at 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming.); *id.* at 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right . . . to compete for space on an operator's system.") (citation omitted).

of cable operators apparently adopted no such policy.[14] In sharp contrast, the district court here found that the "vast majority" of cable systems adopted time channeling to comply with Section 505, that neither Playboy nor the government could identify a single cable system that had adopted double scrambling, and that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. J.S. App. 16a-17a.

Even in those systems that chose to restrict indecent leased access programming pursuant to Section 10(a), the First Amendment question there is quite different from the one presented here. Section 10(a) expanded cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.[15] Moreover, unlike the governmental mandate imposed by Section 505, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent." Such leased access requirements can only be enforced pursuant to a "written and published policy" *Denver*, 518 U.S. at 752 (plurality op.) (published policy requirement "protects against over broad application of its standards"), and must be applied consistently to "substantially similar programming," *id.* at 752-753.

Section 505 restricts a great deal more speech than Section 10(a), and is far more censorial than the restrictions upheld in

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[14] *See Cable Television Consumer Protection & Competition Act of 1992*, 62 Fed. Reg. 28371, 28371 (May 23, 1997) (only about 100 cable systems expected to adopt a written policy limiting indecency); *Denver*, 518 U.S. at 745 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*").

[15] *Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests); *see also* Brief for the Federal Respondents, 1996 WL 34132 at *25, *Denver* (Nos. 95-124 & 95-227), (the rules "limit programmers' expressive activity only insofar as -- and to precisely the same extent as -- they expand that of the operators").

Pacifica. Whether or not some of *Pacifica's* reasoning may apply to cable television as suggested by the *Denver* plurality, the time channeling requirement of Section 505 is far more restrictive of speech when applied to cable television networks than it is in the broadcasting context. With respect to broadcasters, the safe harbor rules may require a station to reschedule a particular program to late night hours.[16] By comparison, Section 505 targets "channels" not "programs," and the court below found that the affected networks had "no practical choice" but to go dark for 16 hours per day. J.S. App. 17a; *cf. United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (blanket rule "chills potential speech before it happens" and imposes greater First Amendment burden than "an isolated disciplinary action"). This is a fundamental breach of the basic principle that "'[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *.'"[17] The problem is exacerbated by the government's failure to clarify the indecency standard under Section 505. Although the district court found it unnecessary to resolve the vagueness issue because it was able to decide the case on other grounds, the record below

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[16] *Pacifica* upheld only the government's ability to subject a particular broadcast to subsequent review. 438 U.S. at 735-738. It did not authorize the FCC "to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves." *Id.* The Court noted that the ruling applied only to the "specific factual context" presented by the FCC's order -- whether the Commission had the authority "to proscribe this particular broadcast," *id.* at 742 (internal quotation marks omitted), and expressly limited its holding to approve only the "subsequent review" of the particular words that had been broadcast, *id.* at 737; *see also Reno*, 521 U.S. at 867 (the order in *Pacifica* "targeted a specific broadcast").

[17] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O'Connor, J., concurring in part and dissenting in part) (citation omitted) ("*Turner I*"); *see Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1110 (D. Utah 1985) (impact of indecency time channeling is far more burdensome for cable network than for broadcast station), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *cf. Becker* v. *FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred audience" and "inevitably interfere[s] with * * * freedom of expression").

clearly establishes that government's failure to provide a coherent standard magnifies the restrictiveness of Section 505.[18]

Unable to deny that Section 505 restricts protected speech, J.S. 18 n.6, the government asserts that the time channeling regulation upheld in *Pacifica* is more restrictive than Section 505 because it "directly regulated a desired communication, rather than . . . a byproduct (signal bleed) of a communication."[19] But this is a *non sequitur*. Appellants' characterization of signal bleed does not make Section 505 any less of a direct restriction on speech; nor does it deny that the law imposes a de facto 16 hour per day ban on adult networks in most cable systems. J.S. App. 17a. It is merely an attempt to imply that signal bleed may be more intensively regulated as a "secondary effect[]" -- an argument that was thoroughly analyzed, and debunked, by the district court. *Id.* at 24a-25a; *see also Reno*, 521 U.S. at 867; *Boos v. Barry*, 485 U.S. 312, 320-321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-215 (1975).

Finally, in seeking to apply *Pacifica* wholesale to cable television, the government ignores an important distinction between the broadcast and cable media. The broadcasting "safe harbor" rules historically were based on the fact that blocking

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[18] The government argued that even safe sex materials should be considered indecent if presented on Playboy Television, Defs.' Post-Trial Br. at 67-69, directly flouting this Court's concern in *Reno* that a vague indecency standard could restrict the presentation of safe sex instructions and would chill material that contains "any of the seven 'dirty words' in the *Pacifica* monologue." 521 U.S. at 854, 870-872, 877-879. This issue would provide an independent reason to affirm the decision below if this case were to be accepted for full briefing and argument.

[19] J.S. at 16-17. The government also claims that the regulation upheld in *Pacifica* is more restrictive because it does not allow broadcasters the alternative of blocking. However, Section 505 is no less burdensome because cable operators are provided an even more restrictive option that the district court found offered "no practical choice." J.S. App. 17a.

technology did not exist for radio or for free television.[20] Accordingly, whatever First Amendment burdens that resulted from the broadcasting safe harbor were more easily justified in that specific context because there was no other way to address the government's concern. With cable television, however, as this Court discussed in some detail in *Denver*, 518 U.S. at 755-757, various options including lockboxes exist and must be provided free to the subscriber upon request under § 504. Further, the district court found that installation of a blocking device under Section 504 effectively "eliminate[s] reception both of undesired channels and of undesired signal bleed." J.S. App. 10a. This difference, in addition to the inherent burdens of time channeling, renders Section 505 far more restrictive than necessary even under intermediate First Amendment review.

2. The Government Did Not Show That the Recited Concerns Are Real, Not Conjectural, or That Section 505 Will Alleviate the Purported Harms

Questions of its restrictiveness aside, Section 505 flunks intermediate First Amendment scrutiny for an even more basic reason. The district court's factual findings amply reveal that the government failed to demonstrate "that the recited harms [to be addressed by Section 505] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664 (internal quotation marks and citation omitted); *see Denver*, 518 U.S. at 766 (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Reno*, 521 U.S. at 858 n.24. (noting the lack of legislative investigation preceding passage of the Communications Decency Act). After two years of

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[20] *See In re Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5309 (1990) (separating children from adults in the broadcast audience is an "impossibility"); *see also id.* at 5305 ("parents' control of children's television viewing * * * differs from parental control of cable viewing."); *Denver*, 518 U.S. at 775 (Souter, J., concurring) ("broadcasts [are] * * * difficult or impossible to control without immediate supervision").

litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a.

The legislative history provides no evidence to support the government's position. Section 505 was adopted as an eleventh hour amendment to a comprehensive telecommunications bill without discussion, supported only by the sponsors' unadorned assertion that "numerous" cable systems failed entirely to scramble their signals on adult channels. *See* 141 Cong. Rec. S8167. There were no hearings, debates, or congressional findings before Congress voted on the amendment. Moreover, no testimony or other evidence ever suggested that children would be harmed in any way by occasional or fleeting exposure to garbled cable signals.[21] When the district court granted the temporary restraining order in this case, it noted that "the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such exposure has on minors." App. 15a-16a; *see also id.* at 15a (noting "an absolute void of legislative findings"). At the preliminary injunction stage the court similarly pointed out that there had been "no debate on the amendment and no hearings," J.S. App. 54a, and it called on the government to provide "more specific evidence of the number of households with the potential for signal bleed" at the hearing on a permanent injunction, *id.* at 53a & n.16.

This Court has approved the use of judicial proceedings to supplement the abstract concerns of Congress where the

[21]The government's argument that it need not present "scientific evidence" of harm, J.S. 20-21 n.7, misses the point. Although the psychological evidence was in dispute in the proceedings below, the district court was also concerned about the lack of evidence that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." J.S. App. 29a; *see Sagittarius Broad. Corp.*, 7 FCC Rcd. 6873, 6874 (1992) (concern over indecency is not present where sexual import of material is "barely intelligible, much less inescapable to adults" so that those who randomly tune in would be unlikely to "continue listening" or unlikely to "discern the [material's] sexual meaning").

legislative history lacks the necessary factual findings. *Turner I*, 512 U.S. at 664-668. Indeed, this Court narrowly upheld the constitutionality of must carry regulations after a comprehensive record was compiled on remand. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997) ("*Turner II*"). However, the differences between *Turner* and this case are highly instructive:

- Must carry rules were enacted only after years of detailed study, *Turner I*, 512 U.S. at 632; *Turner II*, 520 U.S. at 199 (Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies"), whereas Section 505 was adopted despite an "absolute void" of legislative findings.

- To support must carry rules, the FCC conducted a "contemporaneous study" of television stations that had been dropped from cable systems, *Turner II*, 520 U.S. at 203, whereas here, the government could identify only 72 specific complaints "which the FCC believes are at least potentially related to indecent or sexually explicit cable programming" out of "33,000 informal written complaints about cable service generally." Pl.'s Trial Ex. 119 (Defs.' Answer to Interrog. No. 2). And the 72 complaints did not all relate to "sexually-oriented" channels or to the issue of signal bleed, but to programming on networks as diverse as HBO, Cinemax, The Movie Channel, Showtime, MTV, E!, CNN, Bravo, The Disney Channel, Viewer's Choice, A&E and Nickelodeon. Pl.'s Trial Ex. 43.

- In *Turner*, the legislative record in support of must carry rules was supplemented by an additional 18 months of factual development in the courts "yielding a record of tens of thousands of pages of evidence" that included congressional findings, expert submissions, sworn declarations and industry documents. *Turner II*, 520 U.S. at 187 (internal quotation omitted). Here, however, after two years of litigation the government presented "no evidence on the number of households actually exposed to signal bleed, and managed to compile anecdotal evidence comprising "only a handful of isolated incidents over the 16

years since 1982 w[illegible]n Playboy started broadcasting." J.S. App. 11a-12a.

Ultimately, the government's evidence in support of Section 505 amounted to accounts of two city councillors, eighteen individuals, one United States Senator and the officials of one city. J.S. App. 11a. In *Denver*, this Court found similar evidence to be inadequate to support restrictions on indecent programming on public access channels. Although the record contained "anecdotal references to what seem isolated instances of potentially indecent programming," the plurality found that "these few examples do not necessarily indicate a nationwide pattern." *Denver*, 518 U.S. at 764 (plurality op.). The *Denver* plurality concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Id.* at 766. The same conclusion is warranted here, where the government failed to show that signal bleed is a pervasive problem. *See* Richard Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993 at 34 ("in a nation of 260 million people, anecdotes [to establish problems of pornography] are a weak form of evidence").

Nor did the government demonstrate that imposing the "safe harbor" under Section 505 "will in fact alleviate [the] harms [of signal bleed] in a direct and material way." *Turner I*, 512 U.S. at 664; *Denver*, 518 U.S. at 766 (plurality op.) ("we cannot assume that the harm exists or that the regulation redresses it"). Appellants have assumed that the safe harbor will serve their stated interests, but the basis for this assumption is undermined by the factual findings below and by the government's own position. The district court pointed out, for example, that "a resourceful minor can still watch signal bleed after the safe harbour hours." J.S. App. 37a. Moreover, the same factor that prompted the government in this case to describe the safe harbor as a "modest" restriction (J.S. 18 n.6) -- "the easy availability of VCR machines" -- undermines its assumptions as to the effectiveness of Section 505 to protect children. The FCC in the past has concluded that time channeling is ineffective to protect children from indecent

programming because of VCRs in children's rooms.[22] The district court should be summarily affirmed where, as here, the regulation of speech at issue provides only limited or incremental support for the interest asserted. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 73 (1983); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

C. The District Court Correctly Held that Section 505 is More Restrictive Than Section 504

In holding that Section 505 is not the least restrictive means, the district court straightforwardly applied settled law. J.S. App. 32a-39a. Under traditional First Amendment analysis, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Here, the court below found that Section 505 required cable operators "to prevent [signal] bleed in all non-subscribing households, irrespective of whether a household has children," and that "two-thirds of all households in the United States have no children." J.S. App. 33a-34a. Additionally, the district court noted that Section 504 is not content-based, *id.* at 35a, and that the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute. *Boos v. Barry*, 485 U.S. at 329. It concluded that "§ 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights."[23]

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[22] *Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992*, 8 FCC Rcd. 998, 1009 (1993) (Commission expressly declined to adopt time channeling for leased access programming under the 1992 Cable Act); *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5306-07 (time channeling is ineffective because of VCRs in children's rooms).

[23] J.S. App. 38a. To ensure that cable subscribers have adequate notice of their rights under Section 504, the district court directed Playboy to work with MSOs to provide such notice. Appellee has taken no position on the legality of such a command, and did not file a cross-appeal to this aspect of the decision below. In any event, Playboy's extensive arrangements to provide the contemplated notice

Appellants erroneously characterize this holding as a "particularly rigorous" application of strict scrutiny, J.S. 16, and criticize the court below for relying on a "hypothetical, enhanced version of section 504" in its analysis, *id.* at 18. The government argues that voluntary measures, even with "adequate notice," are ineffective, noting that very few cable subscribers (less than one percent) have obtained blocking devices." *Id.* at 16. And it asserts that if such measures became effective they would be more restrictive than Section 505 because "the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to make carriage of the sexually explicit channels uneconomical." *Id.* at 19. Finally, the government claims that voluntary solutions are insufficient, because they fail to serve society's "independent interest" in protecting children from sexually-oriented material. *Id.* at 22. These arguments are baseless.

The government's repeated complaint about Section 504 with notice as being "hypothetical" or "uncertain" is most curious since courts routinely consider potential alternative measures. *See Reno*, 521 U.S. at 855 ("the evidence indicates that 'a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available'") (citation omitted); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989) ("[f]or all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective"). Quite obviously, the least restrictive means analysis calls upon courts to anticipate measures Congress might employ to achieve its stated goals, and it does not require that such measures actually be adopted and proven effective. *See, e.g., id.* at 129-130 (government has the burden to prove that its restrictions on speech are the least restrictive alternative). That Congress could have enacted an enhanced notice requirement for Section 504 here, not

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are described in Playboy's Combined Opposition To Defendants' Post-Trial Motions at 13-14.

that it did so, is what undermines Section 505.[24] If the law were otherwise, Congress could censor speech at will merely by refusing to enact less restrictive alternatives.

In *Denver*, this Court invalidated mandatory blocking and segregation requirements for indecent speech on leased access channels. Acknowledging that no regulatory provision "short of an absolute ban" on indecent speech will completely protect children from potential exposure, *Denver*, 518 U.S. at 759 (plurality op.), this Court compared the various restrictions contained in the 1984 Cable Act (lockboxes), the 1992 Cable Act (segregation and blocking of indecent leased access programs) and the Telecommunications Act of 1996 (Sections 504, 505 and the V-chip requirement) and found that the blocking and segregation requirement was excessively restrictive, *id.* at 757-758 (plurality op).[25] This Court stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Id.* at 758 (plurality op.) (emphasis in original) (citing *Boos* v. *Barry*, 485 U.S. at 329). The same analysis applies to Section 505.

Contrary to the Appellants' argument here, this Court in *Denver* did not conclude that the deficiencies of lockboxes, including the possibility of "inattentive parents," showed the need for mandatory restrictions. 518 U.S. at 758 (plurality op.). Indeed, the Court concluded that any perceived problems raised by the government should be cured by less burdensome means, such as informational requirements, a simple coding system, or readily available blocking equipment accessible by telephone. *Id.* at 759.

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[24] Because a reviewing court may postulate possible alternative regulations, the district court's directive that Playboy provide "effective notice" of Section 504 is not essential to the decision. It is sufficient that Congress might have adopted such a requirement.

[25] This Court mentioned Section 505 as one potentially less restrictive alternative in *Denver* because it analyzed the Communications Act "as recently amended." 518 U.S. at 756. However, it emphasized that the constitutionality of Section 505 and other Telecommunications Act provisions was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*

In short, notwithstanding Appellants' complaints, the district court's contemplation of an "enhanced" Section 504 is fully supported by precedent.

The government's suggestion that the relatively low rate of lockbox distribution, J.S. 9, 16, shows the ineffectiveness of voluntary measures ignores the lack of proof of the pervasiveness of signal bleed.[26] Because Appellants could locate only a handful of anecdotal accounts of signal bleed in the 16 years Playboy Television has been on the air, the court below quite reasonably concluded that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." J.S. App. 36a. The important point here is not how many lockboxes have been distributed, but that, in the cases in which the government was able to find a problem, Section 504 was effective in solving it. J.S. App. 12a ("[i]n each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity").[27]

Nor is there any substance to Appellants' speculative claim that an enhanced Section 504 is in reality more restrictive than Section 505 to the extent "adequate notice" might prompt cable operators

[26] Appellants' disenchantment with voluntary parental empowerment measures also contradicts the only congressional findings on the subject. Congress found that parents have and will take an active role in supervising their children. Telecomms. Act of 1996 § 551(a)(7) ("[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control . . . .") (reprinted at 47 U.S.C. § 303 note). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. *Id.* at (a)(9); *see also* 47 U.S.C. § 544(d)(3) (notice requirement permits parents to block free access by non-subscribers to premium cable channels that provide films rated X, NC-17 or R).

[27] The government's analysis also ignores the fact that other alternatives to control programming now exist. J.S. App. 10a. ("modern TVs and VCRs have both lockout and V-chip features by which a consumer can program the TV or VCR to block reception either of an undesired channel or of offensive types of programming"); *cf. Reno*, 521 U.S. at 854-855 (anticipating private, voluntary use of filtering software).

to drop adult networks.[28] First, there is zero factual support for the government's assertions that the number of actual requests for blocking devices "could be expected" to make adult channels uneconomical and that an enhanced version of Section 504 "would likely lead to at least the same restriction of speech as does Section 505." J.S. 19. It strains credulity to assume that enhanced notice requirements would increase the number of complaints from the "handful of isolated incidents" in the record below, J.S. App. 11a-12a., to the millions that would be required to make adult channels uneconomical.[29] Second, as a matter of law, such economic choices are not more restrictive. *See Denver*, 518 U.S. at 746-747 (plurality op.) (provision that allows cable operators to drop indecent programming and "create[s] a risk that a program will not appear" is "significantly less restrictive" than mandatory time channeling). Third, the argument is based upon a false dichotomy. The choice is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together.

Finally, Appellants' claim that an "enhanced" version of Section 504 "ignore[s] society's independent interest in seeing to it that children are not exposed to sexually explicit materials" misapprehends both the law and the facts of this case. J.S. 22. The government assumes for purposes of this argument that Section 504 with notice "would be sufficient to inform parents of the problem of signal bleed and to permit them to eliminate it easily and effectively." *Id.* Yet it cannot show that the "independent interest" in protecting children is not protected by Section 504 even without "enhancement." *See* J.S. App. 12a. Since the government never demonstrated the pervasiveness of the signal bleed problem, yet acknowledges that Section 505 is a restriction on Playboy Television during "the hours when most people want to see such programming," J.S. 18 n.6, this argument

[28] Of course, if Appellants were correct, they could not claim that children would be harmed if the decision below is affirmed.

[29] Six percent of the 62 million cable television households in the United States -- the number used in the government's "break-even" analysis -- is equal to 3.72 million households.

flies in the face of the bedrock principle that the government's interest in protecting children from indecent materials "does not justify an unnecessarily broad suppression of speech addressed to adults." J.S. App. 33a; *Reno*, 521 U.S. at 874-875.

There is no legal support for Appellants' argument that the government may restrict protected speech despite the existence of effective voluntary protections because some parents may "fail to exercise their own authority." J.S. 22. This Court addressed the identical question in *Denver*, (including the problem of "inattentive parents") and decided that voluntary solutions are constitutionally superior to mandatory restrictions, even if children may not be completely shielded from potential exposure. Appellants' position here is contrary to the clear weight of precedent. *Reno*, 521 U.S. at 875; *Bolger*, 463 U.S. at 73-74; *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 730 (1970).

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION REGARDING THE DISTRICT COURT'S DISMISSAL OF APPELLANTS' POST-TRIAL MOTIONS

This Court should summarily affirm the district court's dismissal of Appellants' post-trial motions because the government fails to even assert, much less prove, the existence of a substantial federal question. Appellants filed a post-trial motion, pursuant to Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment by limiting relief solely to Playboy, as well as a motion to correct judgment, pursuant to Rule 60(a), seeking to add the district court's "effective notice" language to the Order. The district court properly dismissed both post-trial motions for lack of jurisdiction. J.S. App. 91a.

The district court was clearly correct. Appellants' argument violates the well-settled rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance," and that a federal district court and a reviewing court "should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). By noticing its appeal, the government deprived the district court of jurisdiction

to consider its post-trial motions. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982). As the leading Supreme Court procedure treatise makes clear "[a]n attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Robert L. Stern, Eugene Gressman, et al., SUPREME COURT PRACTICE 392 (7th ed. 1993).

The government here claims that simultaneous jurisdiction is appropriate, asserting that its first Notice of Appeal was effective but that it did not deprive the district court of jurisdiction. J.S. 25. The basic flaw in this argument, apart from the fact that this case is not governed by Rule 4, Fed. R. App. P., is that the government was not seeking to alter some collateral issue in its post-trial motions but raised issues that went to the heart of the district court's order.[30] In particular, Appellants' Rule 59(e) motion to limit relief to Playboy would have effectively converted Appellee's facial challenge to an as applied challenge of Section 505. It is no answer to suggest that there is "no chance" that the lower court would be acting on a post-trial motion at the same time as this Court because the appellant is allowed 60 days to file a jurisdictional statement. J.S. at 28. The district court may take more than the allotted time to issue a decision, and the appellant may file its jurisdictional statement early. In any event, for the purpose of preparing a jurisdictional statement, it is impossible to determine what substantial federal questions have been raised if the judgment may be altered in the interim.

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[30] Appellants' citation of *League of Women Voters* is of no help. There, this Court made quite clear that it could exercise simultaneous jurisdiction in that case only because the post-trial motion was entirely collateral and "uniquely separable from the cause of action." 468 U.S. at 373-374 n.10 (citation omitted). The post-trial motion there had no effect on "the prompt determination by the court of last resort of disputed questions of constitutionality of acts of the Congress." *Id.* (citation omitted). *League of Women Voters* is particularly inapt here, since the Telecommunications Act established an expedited appeal procedure for the very purpose of permitting this Court to rule on disputed questions of constitutionality of an act of Congress. Telecomms. Act of 1996 § 561(b) (reprinted at 47 U.S.C. § 223 note).

Here, there is virtually no suggestion that the district court's decision to dismiss the post trial motions presents a substantial question that requires this Court's attention. Indeed, the government characterizes its own post-trial motions as seeking to correct a "clerical mistake[]," which "arguably did not seek to alter the rights adjudicated." J.S. 26 & n.10. Appellants assert only that the question is of substantial significance because other litigants may be uncertain under current Court rules about how to preserve both their right to appeal and to obtain postjudgment relief in cases where there is a direct right of appeal. *Id.* at 28. Not only is the significance of this question entirely speculative,[31] but the controversy arises from a perceived ambiguity in Rule 18.1 that would be more sensibly resolved by resort to this Court's discretion to clarify its own rules than to its appellate jurisdiction.

CONCLUSION

For the foregoing reasons, Appellee respectfully urges this Court to affirm the decision of the district court.

Respectfully submitted,

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[31] Only a handful of cases arise each year under this Court's direct appellate jurisdiction since Congress repealed the principal statutes requiring the use of three-judge district courts in the 1970s. Robert L. Stern, Eugene Gressman, et al., SUPREME COURT PRACTICE at 56. This is not to suggest that some other case might not present a substantial federal question where this one does not, but the small numbers indicate how little "uncertainty" to expect.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94/96-107 JJF
Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC., GRAFF PAY-PER-VIEW INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

Mar. 7, 1996

OPINION

/s/ JOSEPH J. FARNAN JR.
FARNAN, District Judge

I. INTRODUCTION

Presently before the Court is the Application for a Temporary Restraining Order filed by Playboy Entertainment Group, Inc. ("TRO") (D.I. 3).[1] Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Playboy seeks to prevent Defendants the United

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[1] Subsequent to the filing of the instant action, Graff Pay-Per-View, Inc. filed a similar action against Defendants. *See Graff Pay-Per-View v. Reno*, C.A. 96-107-JJF. Sim ltaneously with the filing of its Complaint, Graff filed an Unopposed Motion to Consolidate its action with the instant action. The Court entered an Order granting Graff's motion.

States, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission ("FCC")[2] from implementing or enforcing Section 505 of the Telecommunications Act of 1996 (the "Act")[3] pending a preliminary injunction hearing before a three-judge court.[4] Playboy contends that Section 505 of the Act violates the First Amendment and the Equal Protection Guarantee of the Fifth Amendment of the United States Constitution. The Government opposes the granting of a TRO on the grounds that Playboy has failed to satisfy the TRO standards necessary to bar the enforcement of an Act of Congress. (D.I. 21 at 3.) As provided in the Act, Section 505 becomes effective on March 9, 1996, 30 days after it was signed by the President.

The Court has jurisdiction over this matter pursuant to Section 561 of the Act. This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

II. BACKGROUND

A. Section 505 of the Telecommunications Act of 1996

Section 505 provides in its entirety:

> SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.
>
> (a) REQUIREMENT. In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
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> (b) IMPLEMENTATION. Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION. As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Section 505 requires a video programming distributor ("a cable operator") to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming," often referred to as an "adult network." Section 505 requires that any such channel must be fully scrambled regardless of whether scrambling has been requested by the customer. If a cable operator does not or cannot comply with this requirement, it is prohibited from transmitting the adult channel programming ("block requirement") during hours of the day when minors are most likely to view it. Section 505 provides that said hours shall be determined by the FCC.[5] Cable operators must be in full compliance with the Section 505 blocking requirements by March 9, 1996, or risk exposure to possible enforcement by the Government and resulting penalties.

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[2] The Court will refer to the Defendants as the "Government."

[3] Section 505 of the Telecommunications Act will be codified at 47 U.S.C.A. § 641.

[4] Section 561 of the Act requires that facial challenges to the Act's constitutionality must be heard by a district court of three judges empaneled pursuant to 28 U.S.C. § 2284.

[5] *See* Order and Notice of Proposed Rulemaking amending 47 C.F.R. § 76 (F.C.C., effective March 9, 1996). By this action, the FCC has set the hours of 10 p.m. to 6 a.m. for adult programming as contemplated by Section 505. *Id.* at III.A.

B. History of Section 505

The Telecommunications Act of 1996, enacted on February 9, 1996, resulted from a Congressional effort spanning several years to restructure the telecommunications industry. Extensive debates and hearings were held by both the United States Senate and House of Representatives on numerous issues addressed by the Act, although no hearings were held with regard to the provisions of Section 505.

During the final days of Congress' consideration of the Telecommunications Act, Senator Diane Feinstein of California, on her behalf and on behalf of Senator Trent Lott of Mississippi, introduced Amendment 1269 which ultimately became Section 505 of the Act. Although Senator Feinstein spoke at length about the amendment at the time of its introduction, no hearing or debate was held, and the amendment was voted upon and passed the same evening as its introduction. 141 Cong. Rec. S8167 (daily ed. June 12, 1995).

Senator Feinstein, in addressing the Senate, stated that the blocking requirements required by the amendment were "rather simple and direct . . . [and] commonsense . . . ." The Senator asserted that such an amendment was needed despite other provisions of the Act that addressed similar concerns.[6] In support of this assertion, Senator Feinstein cited a communication she received from a local city councilman from Poway, California, a suburb of San Diego, who told the Senator that 320,000 cable customers in the Poway area were receiving unscrambled and sexually explicit audio and video cable programming although they had not subscribed to it. Senator Feinstein observed that the Poway experience was not an isolated incident. The Senator noted that in Washington, D.C., unscrambled sexually explicit pornography had been transmitted to non-subscribing cable customers. Although the Senator acknowledged that the National

[6] Specifically, Section 504 of the Act requires that "[u]pon request by a cable service subscriber, a cable operator, shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." Section 504(a).

Cable Television Association had adopted guidelines concerning such transmissions (*see* Aff. D. Brenner ¶ 4), the Senator found that these endeavors were insufficient:

> The problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television. Currently, adult programming varies from community to community, as does the amount and effectiveness of scrambling on each local cable system. Right now, it is up to the local cable operator to monitor itself. This is like the fox guarding the hen house.
>
> . . . the voluntary guidelines simply recommend that local cable operators "block the audio and video portions of unwanted sexually-oriented premium channels at no cost to the customer, upon request." While this is a somewhat commendable effort on the part of the industry, I do not think it goes far enough.
>
> . . . .
>
> I do not believe that sexually explicit adult programming should automatically be broadcast into a program subscriber's home. On the contrary, I believe that sexually explicit programming should be automatically blocked, unless a program subscriber specifically requests the programming.

In response to the cable industry's concerns about technology problems and extraordinary fiscal costs that the amendment would impose on them, Senator Feinstein advised:

> The bottom line, however, is that fully scrambling both the audio and video portion of a cable program is technologically feasible . . . . With regard to their fiscal concerns, I have never been given any information from the industry to document what the actual costs to cable operators would be.

Senator Feinstein concluded that the amendment gave cable operators options, and the fact that the operators had 30 days to comply gave them ample time:

> . . . the amendment leaves it up to the local cable operator on how and when to come into full compliance . . . .
>
> This amendment also does not become effective until 30 days after enactment, so cable operators will have plenty of time to either fully block the programming, or restrict access to certain times of the day.

Id.

Senator Lott, addressing the Senate after Senator Feinstein, emphasized that he did not "want to exaggerate what this amendment will do. It simply requires cable operators to fully scramble sexually explicit programming if someone has not subscribed for such programming." *Id.* at S8169.

Attached to the legislative record, although apparently not discussed on the floor, is a memorandum from a legislative attorney for the American Law Division of the Congressional Research Service, Library of Congress, which opined as to the constitutionality of the proposed amendment. *Id.* at S8168. The legislative attorney reviewed current legal standards concerning restrictions on cable television. He concluded that the amendment was constitutional; however, he cautioned that the phrase "during hours of the day (as determined by the Commission) when children are most likely to view it" could be found to be overly broad, noting that this provision might have to be modified to "prohibit such programming when the ratio of children to adults is significantly high." *Id.*

The amendment passed by a unanimous vote.

C. The Fundamentals of Cable Television Programming

Cable television is a service that presently can provide cable customers with a choice of over 100 channels of programming. Unlike broadcast television,[7] cable television is available only to

[7] Broadcast television uses a signal received by household antenna via airwaves, whereas cable television uses cables.

those customers who choose to pay for it. Subscribers may choose from several available "packages." For example, "basic" cable service generally includes several broadcast stations, their local affiliates, and additional channels such as the Discovery channel, A&E television, CNN and C-Span. Customers may choose other "premium" packages which provide additional programming channels, such as HBO/Cinemax, Showtime/The Movie Channel and Playboy Television. Additionally, many cable system operators offer Pay-Per-View programming, in which subscribers may view a certain movie at a certain time on their television for a set fee.

The technology involved in cable television is fairly straightforward. Signals from various sources such as master antennas, satellites, or local television studios are received by the cable operator and then transmitted by the cable operator from its facility to customers' houses. The cable operator transmits the signals to customers through coaxial cable. (Aff. Ciciora ¶ 5.)[8]

From the inception of cable television systems, coaxial cables have provided the capacity to carry many more channels of television programming than can be provided by broadcast television channels. (Aff. Ciciora ¶ 6.) For example, because of interference from stations operating on the same channel in other communities and from stations operating on adjacent channels in the same community, the number of broadcast channels available over the airways in one community could not exceed seven (as in New York City) and rarely exceeded three or four. Because cable systems did not use the airwaves, they did not experience channel interference problems and therefore could transmit programming over their entire 12-channel capacity. (Aff. Ciciora ¶ 7.) With the advent of satellite-delivered programming, cable systems began to expand the capacity of their coaxial transmission facilities to 36, 54 and even 100 channels.

[8] Walter S. Ciciora was Vice President, Technology, Time Warner Cable from 1989 to 1993, and in that capacity was primarily responsible for cable technology matters. (Aff. Ciciora ¶ 2)

As more households subscribed to cable television and more cable systems increased their channel capacity beyond the 12 channels, television set manufacturers began making "cable-ready" or "cable-compatible" television sets. These sets are capable of directly tuning the nonbroadcast channels typically used by cable systems. Cable subscribers who own cable ready television sets do not need converter devices to tune those channels, unless the audio or video signals are scrambled by the cable system. (Aff. Ciciora ¶ 9.)

D. Practical and Technical Difficulties with Compliance Under Section 505 as Alleged by Playboy

Playboy acknowledges that scrambling and other technologies exist to comply with the provisions of Section 505; however, it asserts that the existing options either fail to fully block the non-subscribed programming or are impossible to install by March 9, 1996.

According to Playboy, all existing cable operators employ technology to protect their premium and pay-per-view channels ("premium services") so that only paid subscribers will be able to receive and view those channels. (Aff. Ciciora ¶ 10.) This technology takes one of three forms and is intended to prevent the audio or video signals of the cable channels from being seen or heard by non-subscribers. These three methods are the installation of: 1) a "scrambler"; 2) a "trap" or a "parental lockout feature ("lockbox")" or 3) substituted video/audio with lockbox. (Aff. Ciciora ¶¶ 11, 16, 22.)

The first option, scrambling, prevents video transmission of the non-subscribed channels, but fails to prevent audio transmission unless additional technology, called "mapping" is used. Scrambling is the implementation of any of a variety of means employed at the "headend" or cable system transmission facility (to distinguish between devices employed at the individual household level) that alters a portion of the television signals so that the picture on the receiving television is impaired. Subscribers to premium networks receive a converter/descrambler (commonly called an "addressable converter") that has the ability to descramble the video alterations and restore the picture. (Aff.

Ciciora ¶ 11.) While the audio portion of a signal can also be scrambled at the headend, most manufacturers of scrambling equipment manufacture only headend equipment and converter boxes capable of scrambling and descrambling video, not audio signals. Consequently, the audio portion of a signal is rarely, if ever, scrambled at the headend. (Aff. Ciciora ¶ 12.)

Thus, when used alone, scrambling fails to suppress the audio of the unwanted channels (absent the use of mapping converters). In addition, scrambling can also fail to prevent the bleeding of the unwanted video signal of adult channels onto the television screens of "basic" programming customers. To prevent this bleeding of non-subscribed programming to the screens of basic customers, cable operators can utilize a "trap" or "lockbox" option.

A "trap" is a piece of hardware that is installed on the cable line coming into a basic programming customer's house. A "negative" trap removes or filters a designated channel signal from a group of incoming channel signals. In the alternative, a converter/descrambler or a lockbox containing traps or filters can be installed on all customers' televisions and VCRs. (Aff. Ciciora ¶ 16.)

Finally, cable operators can prevent cable customers from receiving non-subscribed programming by the use of newer versions of converter/descramblers which substitute alternative video and audio for the scrambled signal. These devices are referred to as a lockbox and permit a parent, through the use of a parental key or personal identification number, to block a television set from receiving the audio or video signal from any selected channel. This technology costs approximately $115.

Playboy offered the testimony of Wayne Hall, Vice President of Harron Communications Corporation ("Harron") to establish the difficulties facing a cable operator seeking to comply with Section 505. By affidavit, Mr. Hall testified that Harron has 245,000 cable subscribers in a seven-state area, approximately 123,000 of which have addressable converter/descramblers. Harron provides all its subscribers, upon request, with a converter/descrambler having a parental lockbox feature. Although Harron rarely receives

complaints about the bleeding of audio or video signal from any premium channel, in order to comply with Section 505 Harron would have to provide blocking devices to approximately 122,000 households that do not presently have them. With only one installer for every 2,500 customers, Mr. Harron testified that it would be impossible for Harron to install blocking devices on those households without a lockbox within any 30 day period, let alone by March 9th. Thus, according to Playboy, if Section 505 is implemented, the only economically viable solution for Harron would be to remove its adult oriented programming except for the late-night hours designated by the FCC for such programming. (Aff. Hall ¶¶ 1-10.)

E. Description of The Playboy Networks

Playboy produces and distributes cable video programming through its two programming networks, Playboy Television and AdulTVision ("the Playboy networks"). The Playboy networks are provided only to adult cable subscribers and only upon request. Playboy also produces and/or licenses, on an exclusive or non-exclusive basis, its programming for use on other major premium networks such as Showtime/The Movie Channel and HBO/Cinemax. According to Playboy, it is not uncommon for the same programming to be shown by both Playboy Television and other non-adult oriented premium or Pay-Per-View networks such as Showtime/The Movie Channel, HBO/Cinemax, Viewer's Choice/Hot Choice, or Action Pay-Per-View. (Aff. Lynn ¶¶ 4, 6, 10-12.)[9]

In addition, Playboy asserts that Playboy Television offers a wide variety of programming, consisting of lifestyle information, news, music, video fiction and short stories, comedy, and other programming that is not sexually explicit. In addition to its regular programming, Playboy contends that Playboy Television provides special programming such as its recent December 1, 1995 four-hour programming on AIDs awareness and safe sexual practices which was done in connection with the World AIDS Day

[9] Anthony J. Lynn is President, Playboy Entertainment Group and Executive Vice President, Playboy Enterprises. (Aff. Lynn ¶ 1.)

created by the World Health Organization in 1988. (Aff. Lynn ¶ 9.)

Playboy states that it has standards and guidelines it uses in determining what programming will be suitable for the Playboy networks. Playboy contends that its standards and guidelines are designed to eliminate any material that can be deemed patently offensive. In order to implement its standards Playboy employs four in-house lawyers who allegedly review all Playboy programming to ensure that it is neither obscene nor violative of any community standards. (Aff. Lynn ¶ 14.)

Playboy asserts that no court or administrative agency in any jurisdiction has ever found that the Playboy networks or any of their programming to be either obscene or harmful to minors. Similarly, Playboy contends, in over forty years of publication, not one issue of Playboy magazine has ever been found to be obscene or harmful to minors by any judicial or administrative system, state or federal. In support of this contention Playboy notes that the United States Attorney General's Commission on Pornography concluded that Playboy magazine is "plainly non-offensive." (Aff. Lynn ¶ 15.)

III. PARTIES CONTENTIONS

In this litigation, Playboy contends that it is entitled to a TRO against the implementation and enforcement of Section 505 the Act. Playboy contends that it is likely to succeed on the merits of the case, because (1) the First Amendment forbids the application of indecency regulations to television programming (D.I. 7 at 18); (2) the Government has not established any compelling governmental interest in support of Section 505 (D.I. 6 at 29); (3) the requirements imposed by Section 505 are content-based and are accordingly unconstitutional (D.I. 7 at 31); and (4) Section 505 does not constitute the least restrictive means of serving the government's interest (D.I. 7 at 40).

In addition, Playboy contends that it will suffer irreparable injury if the Defendants are not enjoined (D.I. 7 at 48); that the balance of interest between the parties supports the issuance of a

TRO (D.I. 7 at 50); and, finally, that the public interest supports the issuance of a TRO (D.I. 51).

In response, the Government contends that Playboy has failed to meet the standard required to enjoin the implementation of an Act of Congress. First, the Government argues that an Act of Congress cannot be enjoined absent a showing of compelling circumstances, and that in order for temporary injunctive relief to be granted, the Court must conclude that each of the four factors considered when ruling on a TRO weigh in favor of the plaintiff, which the Government contends Playboy cannot do. (D.I. 26 at 11.) The Government further contends that Playboy cannot establish that it has a likelihood of success on the merits because: (1) the Government has the authority to restrict access by children to indecency in cable television (D.I. 26 at 13); (2) Section 505 is supported by the Government's compelling interest in protecting minors from indecent televisions programming (D.I. 26 at 17); (3) Section 505 employs the least restrictive means available to further the Government's interests, in that other courts have upheld similar blocking and time-channelling including positive traps. Further, the Government argues that voluntary measures are ineffective, and Section 505 is not a prior restraint on free speech (D.I. 20-28); (4) Section 505 is neither vague nor overbroad (D.I. 26 at 28); and (5) Section 505 does not impermissibly discriminate against indecent programming on channels dedicated to sexually explicit programming (D.I. 26 at 32).

The Government also asserts that Playboy cannot meet the standard for a TRO because Playboy has not carried its burden of establishing irreparable harm. (D.I. 26 at 36.) Finally, the Government contends that the harm to the Government, and the public interest, outweighs Playboy's assertions of harm. (D.I. 26 at 42.)

IV. LEGAL STANDARD OF REVIEW

Four factors must be considered when ruling on a motion for temporary injunctive relief. Those factors are: 1) the likelihood that the applicant will prevail on the merits; 2) the extent of irreparable injury to the applicant as a result of the conduct complained of; 3) the extent of irreparable harm to the defendant

if temporary injunctive relief is granted; and 4) the public interest. *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995); *S&R Corp. v. Jiffy Lube Int'l*, 968 F.2d 371, 374 (3d Cir. 1992). In order to grant an application for a temporary restraining order, the Court must conclude that each of the four factors weighs in favor of granting temporary injunctive relief. *Id.*

V. DISCUSSION

A. The Likelihood That Playboy Will Prevail on the Merits

1. Constitutional Standard of Review

The parties have agreed that at this juncture the strict scrutiny standard of constitutional review applies to Playboy's facial challenge to Section 505.[10] The focus of a strict scrutiny review of an Act of Congress is to determine whether or not the legislation, in this case, Section 505 represents the least restrictive means of achieving the Government's interest. In this case, the Government's interest is to ensure that minors do not have access to non-subscribed adult programming on cable television. With this standard in mind, the Court will proceed to determine whether Playboy has met its burden to demonstrate that it is likely to succeed on the merits with regard to its assertion that Section 505 is unconstitutional.

2. Analysis of the Likelihood of Success on the Merits

After considering the record evidence and arguments presented by the parties, the Court concludes that Playboy has raised serious and substantial questions as to whether the blocking and FCC time requirements imposed on cable operators by Section 505 of the

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[10] In general, sexual expression which is indecent, but not obscene, is protected by the First Amendment to the United States Constitution. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). However, indecent speech may be regulated by the Government in order to promote a compelling interest, provided that the Government chooses the least restrictive means to further its articulated interest. *Id.* The least restrictive means will further the Government's interest through narrowly tailored regulations which do not unnecessarily interfere with First Amendment freedoms. *Id.*

Telecommunications Act of 1996 constitute the least restrictive means of achieving the Government's interest in regulating the accessibility of adult programming to minors. Playboy has established that Section 505 may unconstitutionally infringe upon its rights under the First Amendment. At this stage of the proceedings, the Court credits Playboy's assertion that substantially less restrictive means are available to serve the Government's purpose. For instance, Playboy's suggestion that the lockbox technology supplied by cable operators to customers who request it can be an effective and reasonable alternative to the methods dictated by Section 505.

Further, the Court concludes that implementation and enforcement of Section 505 may effectively force cable operators to air Playboy only after 10 p.m. Importantly, such action could occur in the absence of any examination of alternative means, either by Congress or through discovery in this litigation. Because of the obvious importance of First Amendment guarantees, at a minimum, the Court is convinced that further investigation is needed to properly examine the Playboy programming and the feasibility of using alternative technologies prior to permitting the implementation of Section 505.

Although this Court has addressed in a limited manner the merits of this litigation and found a likelihood of success has been demonstrated by the Plaintiff, the Court trusts that the parties understand that a full consideration of the constitutional questions presented here can only be addressed by the three-judge court empaneled to hear this matter.

3. Irreparable Harm

While the judicial power to stay an act of Congress is "an awesome responsibility calling for the utmost circumspection", *Heart of Atlanta Motel v. United States*, 85 S.Ct. 1, 2 (1964) (Black, J., in chambers), the judiciary's responsibility to enforce the First Amendment's express right of free speech is no less important. Accordingly, the United States Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690,

49 L.Ed.2d 547 (1976). Although a plaintiff does not establish irreparable harm simply by asserting a First Amendment violation, the Court of Appeals for the Third Circuit has held that the requisite harm is established where the plaintiff shows that an act of Congress has "a chilling effect on free expression." *American Civil Liberties Union, et al., v. Reno*, No. CIV. A. 96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996), *citing Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989).

Based on the evidence before it, the Court concludes that Playboy has shown that implementation of Section 505 will have a "chilling effect" on the adult-oriented cable television industry. Through the submission of affidavits from industry executives, Playboy has shown that adult-oriented cable television will effectively be turned off upon the implementation of Section 505. In the Court's view, Playboy has established that the short, 30 day implementation period provided for in Section 505 does not allow adequate time for cable companies to acquire and install the required blocking devices. Additionally, record evidence establishes that the cost of installing such devices in every home which subscribes to cable television would be crippling to the cable companies. Furthermore, Playboy has adduced evidence that upon implementation of Section 505 many cable operators who carry Playboy programming will be forced to curtail their transmission of the adult programming to the FCC imposed hours of 10:00 p.m. to 6:00 a.m. The Court is persuaded that such a substantial reduction of viewing time will cause significant financial losses for both the cable companies and Playboy.

Conversely, the Court concludes that the Government has not established that irreparable harm to the Government's interest will result if temporary injunctive relief is granted. Although not required, there is an absolute void of legislative findings that Section 505 is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their parents have chosen not to subscribe to. While it is undisputed that video and audio signals of adult programming channels occasionally bleed into the homes of nonsubscribers, the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult

programming when the bleeding occurs or what effect such exposure has on minors.

As a result, based on the evidence presented the Court concludes that Playboy has established that denial of temporary injunctive relief will have a chilling effect on the adult-oriented cable television industry. Therefore, the Court concludes that the irreparable harm that Playboy will suffer if temporary injunctive relief is denied substantially outweighs any harm the Government will suffer if temporary injunctive relief is granted.

4. The Public Interest

The Court is also persuaded that Playboy has established that the public interest will not be negatively affected if temporary injunctive relief is granted and that maintaining the status quo will not harm the public interest. The contentions of the Government that the public interest will be negatively affected if relief is granted is unpersuasive.

The dilemma of how to effectively shield minors from adult programming is not novel. It has existed for at least a decade. Accordingly, several protective methods are already in place in the cable television industry to permit subscribing parents to completely block out adult programming signals they feel are inappropriate. These protective measures, which include converters and lockboxes, completely eliminate the bleeding problem and are available upon request to cable customers. At this stage of the proceedings, the Court is convinced that these devices are sufficient to provide cable customers with adequate shielding protection until the parties are able to fully litigate the constitutional issues that are beyond the scope of this preliminary proceeding. Thus, the Court concludes that even if the Government has a compelling interest in shielding minors from adult programming, given the length of time the problem has existed and the protective devices already in place, the public interest does not override the irreparable harm that will be suffered by Playboy and the adult-oriented cable television industry if temporary relief is not granted.

5. Balancing of Hardships

The balancing of hardships ensures that the imposition of an injunction preserving the status quo will not harm the Government more than Playboy. *See Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 196 (3d Cir. 1990). The Court has concluded that the potential harm to Playboy absent the issuance of a TRO is substantial. On the other hand, the Court is persuaded that the harm to the governmental interest is minimal. Maintenance of the status quo will mean that parents can continue to block programming on their own or by requesting blocking services from their local cable operator. Although some bleeding or audio breakthrough may continue to occur during the duration of the TRO, the Government could not articulate what impact and such occurrences might have on the target of the Government's announced interest [i.e., minors].[11] Accordingly, the Court concludes that the balance of hardships tips strongly in Playboy's favor.

III. CONCLUSION

For the reasons discussed, the Court concludes that Playboy has met its burden on the relevant factors needed to obtain temporary injunctive relief. Specifically, Playboy has shown a likelihood of success on the merits, irreparable harm if relief is denied, that the Government will not be irreparably harmed if relief is granted and that granting of relief will not adversely affect the public interest. In sum, the Court concludes that a balancing of all the relevant factors weighs in favor of granting temporary injunctive relief.

An appropriate Order will be entered.

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[11] From the record evidence presented at this time, the Court infers that the content of the audio signal that may be heard is akin to the utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94/96-107 JJF
Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC., GRAFF PAY-PER-VIEW INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

[Mar. 7, 1996]

TEMPORARY RESTRAINING ORDER

This 7th day of March, 1996 at 6:30 p.m., having considered Plaintiff Playboy Entertainment Group, Inc.'s Application for a Temporary Restraining Order,

THE COURT FINDS that:

(1) Plaintiff has demonstrated its likely to succeed on the merits of its claim that Section 505 of the Telecommunications Act of 1996 violates the First Amendment of the United States Constitution;

(2) Plaintiff has demonstrated it will suffer irreparable harm unless injunctive relief is granted;

(3) Defendants and others will suffer no harm from the imposition of this Order; and

(4) the public interest supports this Order.

ACCORDINGLY, IT IS HEREBY ORDERED that Playboy Entertainment Group, Inc.'s Application is **GRANTED.** The United States of America, the United States Department of Justice, Attorney General Janet Reno, the Federal Communications Commission, and all their officers, agents, servants, employees, attorneys, and anyone else acting in concert with them are hereby enjoined from enforcing or implementing Section 505 of the Telecommunications Act of 1996 in any manner.

Unless previously ordered by this Court, this Order shall remain in force only until the hearing and determination by the district court of three judges of Plaintiff's Motion for Preliminary Injunction.

/s/ JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 31, 1997

MEMORANDUM OPINION

/s/ JANE R. ROTH
ROTH, Circuit Judge:

The plaintiff in this action, Playboy Entertainment Group, Inc. ("Playboy") challenges the constitutionality of Section 505 of the Communications Decency Act of 1996 ("the CDA" of "the Act"), which is Title V of the Telecommunications Act of 1996, 47 U.S.C.A. § 561 (West Supp. 1997).[1] Congress enacted Section 505 in an effort to eliminate signal bleed, i.e., the partial reception

[1] The factual and procedural background of this case is laid out in detail in this Court's opinion in *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D.Del. 1996).

of sexually explicit adult cable television programming in the homes of nonsubscribers to that programming.[2]

On November 8, 1996, this Court denied plaintiff's request for preliminary injunctive relief to block enforcement of Section 505. *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D.Del. 1996). The Supreme Court entered Judgment Orders summarily affirming this Court's judgment. *Playboy Entertainment Group, Inc. v. United States*, 117 S. Ct. 1309 (1997); *Spice Entertainment Companies, Inc. v. Reno*, 117 S. Ct. 1309 (1997).[3] Following the Supreme Court's affirmance, the temporary restraining order blocking enforcement of Section 505 was lifted.

[2] Section 505 provides:

(a) Requirement

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) Definition

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

[3] After the Supreme Court affirmed this Court's denial of preliminary injunctive relief, Spice Entertainment Companies voluntarily dismissed its claims without prejudice.

In our decision denying preliminary injunctive relief we concluded that Section 505 did not suffer from the "vice of vagueness" and that Playboy would have little likelihood of succeeding on the merits of a vagueness claim. *Playboy*, 945 F. Supp. at 791. This conclusion was based upon our determination that Playboy clearly understood that the law applied to it and that Section 505 used accepted terms, similar to language used by the Supreme Court for similar purposes, which imbued the statute with meaning. *Id.* (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

Presently before the Court are Playboy's Motion for Summary Judgment on Vagueness and defendants' Motion for Partial Summary Judgment on the Issues of Vagueness and Overbreadth. Summary judgment is appropriate "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party cannot rely solely on the allegations contained in its pleading; it must offer specific facts indicating that there is a genuine issue for trial. *Id.* at 324.

When ruling on a motion for summary judgment, the court must construe the evidence and any reasonable inferences that can be drawn therefrom in favor of the non-moving party. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 637 (3d Cir. 1993). While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322-23.

Following the Supreme Court's recent decision in *American Civil Liberties Union v. Reno*, — U.S. —, 117 S. Ct. 2329 (1997),

holding the Internet provisions of the CDA unconstitutional, Playboy argues that Section 505 is also unconstitutionally vague. In response, defendants state that in its decision in *Reno* the Court explicitly declined to reach the question of vagueness, but rather found the relevant provisions of the CDA were unconstitutionally overbroad. Furthermore, defendants contend that Section 505 is neither vague nor overbroad and seek partial summary judgment as to these issues.

The Supreme Court's decision in *Reno* was driven by the unprecedented breadth and scope of the prohibitions on speech that it reviewed and also by the nature of the medium that was being regulated. The Internet is an international network of interconnected computers which has been described as "'a unique and wholly new medium of worldwide communication.'" *Reno*, — U.S. at —, 117 S. Ct. at 2334 (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)(finding 81)). Not only did the Internet provisions of the CDA prohibit the knowing transmission of indecent material to minors,[4] but the technology had not yet developed an effective means of safeguarding against transmission of such material to children. *Id.* at —, 117 S. Ct. at 2347. The very nature of the Internet makes it impossible to utilize an analogue to the scrambling or time channeling requirements imposed by Section 505. Consequently, the provisions at issue in *Reno* functioned as a blanket prohibition against the transmission of indecent material, whether publicly or privately, on the Internet. *Id.* at —, 117 S. Ct. at 2347-48. Such draconian measures were unnecessarily overbroad to protect children from a noninvasive medium like the Internet. *Id.* at —, 117 S. Ct. at 2336 (finding that the "'odds are slim' that a user would enter a sexually explicit site by accident").

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[4] In *Reno*, the Court focused upon two provisions of the CDA. The first prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. 47 U.S.C.A. § 223(a). The second provision prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. *Id.* § 223(d). Affirmative defenses were included for those who took good faith measures to avoid transmissions to minors or for those who restricted access to their communications by requiring age verification. *See* 47 U.S.C.A. §§ 223(b),(e).

In contrast, television, whether broadcast or cable, is a highly pervasive medium. *Denver Area Educational Telecommunications Consortium v. F.C.C.*, — U.S. —, —, 116 S. Ct. 2374, 2386 (1996). It is possible to encounter unwanted and offensive pictures and audio simply by changing channels. Furthermore, because television broadcasting is a highly public forum, there is no risk that Section 505 would impose undue restrictions upon purely private speech. *See Reno*, — U.S. at —, 117 S. Ct. at 2347. There is also a long history of regulation in the area of broadcasting.[5] In the context of radio broadcasting, the Supreme Court has specifically endorsed time channeling as a constitutionally acceptable means of protecting children from pervasive, sexually explicit or indecent speech. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978)(holding that while an indecent monologue deserved first amendment protection, in the appropriate context, the FCC was authorized to restrict radio broadcasts to times when children were not likely to be in the audience). Accordingly, although the Supreme Court's decision in *Reno* is instructive as the most recent analysis by the Court of the state of its own First Amendment jurisprudence, and more specifically, of the validity of a restriction on indecent speech, we do not believe that *Reno* can be completely determinative of the issues presently before this Court.

Moreover, after hearing oral argument on the cross motions for summary judgment presently before the Court, we conclude that these motions are premature, as material questions of fact remain unresolved. We are particularly concerned about the uncertainty which continues to surround the restrictions on programming on channels primarily dedicated to sexually-oriented programming during the non-safe harbor hours, presently the hours from 6:00 a.m. to 10:00 p.m. In order to rule on the questions presented by these motions, including the initial question of whether Playboy has standing to challenge the vagueness of Section 505, we require further information, including Playboy's intentions, if any, to broadcast, outside the safe harbor hours, programming that is not

[5] Section 505 does not, in fact, purport to regulate actual programming, rather it is aimed solely at signal bleed, a mere secondary effect of plaintiff's broadcasts. *Playboy*, 945 F. Supp. at 785.

sexually-oriented or that is materially different in sexual-explicitness to its current format. In addition, our consideration of these questions should be deferred until further information relating to the enforcement of this provision by the Federal Communications Commission (FCC) is before us.[6] Furthermore, there remains a fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours.

Accordingly, it is apparent that issues remain regarding the potential vagueness and overbreadth of Section 505. Discovery is presently ongoing in this case. Because we believe that discovery may further assist us in resolving the questions pending before us, we will deny the cross motions without prejudice to their being refiled at a later time, if appropriate.

An appropriate Order will follow.

[6] For example, at oral argument on the cross Motions, defendants' counsel were unable to advise us whether there are any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels "primarily dedicated to sexually-oriented programming" in construing the scope of permissible regulation under Section 505.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Oct. 31, 1997]

JUDGMENT ORDER

WHEREAS, on this day of October, 1997, upon consideration of the motion of plaintiff for summary judgment on vagueness; defendants' motion for partial summary judgment on the issues of vagueness and overbreadth; the responses of both plaintiff and defendants; and for the reasons stated in the foregoing memorandum opinion,

IT IS HEREBY ORDERED that:

1. Plaintiff's motion for partial summary judgment on vagueness is DENIED without prejudice; and

2. Defendants' motion for partial summary judgment on the issues of vagueness and overbreadth is DENIED without prejudice.

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
United States Chief District Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
United States District Judge

APPENDIX E

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

JAN 30 1998 IN REPLY REFER TO:

Playboy Entertainment Group, Inc.
c/o Robert Corn-Revere, Esq.
Hogan and Hartson, L. L. P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Dear Mr. Corn-Revere:

This is in response to your filing on behalf of Playboy Entertainment Group, Inc. requesting an expedited declaratory ruling ". . . to assist the network and cable operators in identifying which programming must be "fully scrambled," "fully blocked" or subjected to safe harbor obligations pursuant to Section 505 of the Telecommunications Act of 1996." You ask the Commission to review video tapes of nine programs and pass upon their status under the provisions of Section 505, 47 U.S.C. §561.

Section 505 provides that:

> In providing sexually explicit programming or other programming that is indecent on any channel of its service primarily dedicated to sexually oriented programming, a multichannel video programming distributor shall fully scramble or otherwise block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

A declaratory opinion regarding nine video tapes submitted is requested in the context of this provision and to determine compliance with it. Video tapes of the following programs were included: *Doin' it Right; Hot, Sexy and Safe; 360- Sex in the USA; World of Playboy; 9-1/2 Weeks; The Unbearable Lightness* of *Being; Playboy Late Nite; Video Playmate Calendar; Rambo: First Blood Part II.*

The Commission has held that in general, requests for declaratory rulings involving matters directly related to programming issues must be dealt with cautiously. Declaratory rulings involving determinations as to the contents of specific video programs have the potential to be viewed as prior restraints. *See e.g., William J. Byrnes,* 63 RR 2d 216, *app. for rev. den.,* 2 FCC Rcd 3957 (1987); *Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act,* 9 FCC Rcd 7638, n. 16 (1994); *vacated on other grounds sub nom. Becker v. FCC,* 95 F.3d 75 (1996); and *National Association of Independent Television Producers and Distributors v. FCC,* 516 F. 2d 526, 540 (2d Cir. 1975). For these reasons we decline to issue the requested declaratory ruling.

Sincerely,

/s/ MEREDITH J. JONES
MEREDITH J. JONES
Chief, Cable Services Bureau